

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1504

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,
Appellee,

v.

ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS

by mail
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ROBERT C. MACEK, ESQ.,
GROSS, SHUMAN, LAUB & DAVID,
Attorneys for Appellant Sebastian,
2600 Main Place Tower,
Buffalo, New York 14202,
Telephone No. (716) 854-4300.

GEORGE P. DOYLE, ESQ.,
DOYLE, DENMAN & D'AMICO,
Attorneys for Appellant Gibbons,
10 Ellicott Square Building,
Buffalo, New York 14203,
Telephone No. (716) 856-3486.

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A. GERALD KLEPS, REPRESENTATIVE
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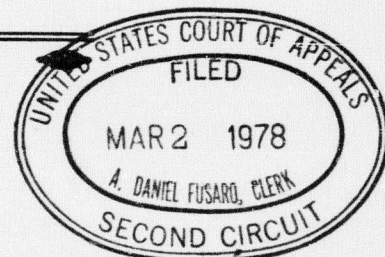


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

-vs-

Docket No. 77-1504

ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS

BRIEF FOR APPELLANTS

Appellants

PRELIMINARY STATEMENT

Anthony James Sebastian and Patrick Gibbons, asserting denial of a speedy trial under the Western District Plan for the Prompt Disposition of Criminal Cases and the Sixth Amendment, appeal from a Judgment of the United States District Court for the Western District of New York (John T. Curtin, C.J.) entered after their pleas of Guilty to two counts of an indictment charging violations of 18 U.S.C. §495 (forged endorsements on U. S. Savings Bonds), which violations were alleged to have occurred in May, 1972. Appellants were originally charged in May, 1973, for the same offense and indicted on charges of violating 18 U.S.C. §471 (uttering and passing forged United States Savings Bonds). This original indictment was dismissed in May, 1976, after a jury was selected and sworn, upon Government counsel's realization that the original indictment had been laid under the wrong statute. After reindictment, the District Court denied the Appellants' Motion to Dismiss

for denial of a speedy trial, and the Appellants pled guilty to two counts of the superseding indictment, reserving, with the consent of the District Court and the Government, their right to appeal the denial of that Motion.

QUESTIONS PRESENTED

1. Whether the Western District's Plan for the Prompt Disposition of Criminal Cases requires reversal and dismissal of the indictment.

2. Whether Appellants were denied their right to a speedy trial under the Sixth Amendment, and are thus entitled to reversal and dismissal of the indictment.

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial...

Western District Plan for the Prompt Disposition of Criminal Cases:*

4. All Cases: Trial Readiness and Effect of Non-Compliance

In all cases the government must be ready

*The Plan was modified, effective July 1, 1976, pursuant to the Speedy Trial Act, 18 U.S.C. §3161 et seq. Section 7 of the modified plan carries forward the requirement for cases arising before July 1, 1977, that the Government be ready for trial within 180 days. Section 10 provides for the exclusion of the periods of delay specified in 18 U.S.C. §3161(h), a slightly different list than that in Rule 5 of the pre-July 1, 1976, Plan. The differences have no effect on this appeal.

for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a scaled indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

5. Excluded Periods.

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:

(a) The period of delay while proceedings concerning the defendant are pending, including but not limited to proceedings for the determination of competency and the period during which he is incompetent to stand trial, pre-trial motions, interlocutory appeals, trial of other charges, and the period during which such matters are sub judice.

(b) Periods of delay resulting from a continuance granted by the District Court at the request of, or with the consent of, the defendant or his counsel, in writing or stated upon the record. The District Court shall grant such a continuance only if it is satisfied that postponement is in the interest of justice, taking into account the public interest in the prompt disposition of criminal charges. A defendant without counsel should not be deemed to have consented to a continuance unless he

has been advised the the court of his rights under these rules and the effect of his consent.

(c) The period of time during which:

(i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period; or

(ii) the prosecuting attorney is actively preparing the government's case for trial and additional time is justified by exceptional circumstances of the case.

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) A reasonable period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

(f) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

(g) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(h) Other period of delay occasioned by exceptional circumstances.

STATEMENT OF FACTS

Anthony James Sebastian and Patrick Gibbons were originally indicted June 21, 1973 for the events charged herein, which were alleged to have occurred in May, 1972. This original indictment (A, 10-12) charged them with two counts of passing and uttering forged United States Savings Bonds (18 U.S.C. §472) and one count of conspiracy thereto (18 U.S.C. §371). Sebastian had been arrested May 24, 1973, for this alleged offense (A,9); Gibbons had been arrested previously (A,87). After arraignment June 28, 1973, each Defendant filed omnibus discovery motions and motions to suppress certain items of physical evidence seized from Defendant Gibbons and a statement taken from Defendant Sebastian. The District Court ordered a hearing for December 19, 1973, on Defendants' suppression motion. The Government filed a purported Notice of Readiness for Trial on November 29, 1973 (A,2,13).

At the Suppression hearing December 19, 1973, the Court, purporting to act under 18 U.S.C. §3500, ordered the Government to turn over to Defense Counsel certain prior written statements of the Government witnesses concerning the subject matter of their testimony, for use in cross-examination of those witnesses. Rather than comply with this order, then Government Counsel, after consulting

with her superiors, refused to produce those prior statements (A,24,30).*

The District Court, basing its order on the Government's noncompliance with the order to produce, ordered the challenged evidence suppressed. The Government filed its Notice of Appeal and Certificate of Appeal on January 14, 1974. On June 6, 1974, in United States v. Sebastian No. 74-1147, 497 F.2d 1267, this Court reversed Judge Curtin's Order. Defendant's Petition for Rehearing was denied August 15, 1974, and on September 16, 1974, Justice Marshall refused to extend the time within which Appellants could file a petition for Certiorari (A,31).

After additional delays, the suppression hearing was resumed June 18, 1975 (Record, item 13; A,32-43). At that hearing, the Government turned over to defense counsel all of the materials it had previously refused to turn over (A,42-43). On December 4, 1975, the Court denied Defendants' motion to suppress, and on December 15, 1975, the case was placed on the trial calendar. A pre-trial conference was held January 9, 1976, and the case was placed on the Ready Trial calendar.

*As will be more fully discussed in Point I, infra., the Government, in choosing to test the District Court's order in this Court, sought to review not only the Court's order herein, but what it regarded as a general policy adopted by the District Court.

The case was finally reached for Trial May 4, 1976, when a jury was selected and sworn. On May 7, 1976, when opening statements were scheduled to begin before the previously sworn jury, the Government moved to dismiss the indictment on the grounds that the Defendants had been indicted under the wrong statute (A, 51-52). The original indictment was dismissed.

On June 24, 1976, three years and three days after the original indictment, Sebastian and Gibbons were indicted again for the same events, this time on thirty-six counts charging a violation of 18 U.S.C. §495 (forging the endorsement on genuine United States Savings Bonds) and one count of conspiracy thereto (A, 56-58). There is no dispute that the superseding indictment charges the same transactions as those charged in the original indictment.

The Government filed its notice of readiness July 15, 1976 (A, 2, 13). Both Defendants, in papers filed September 20, 1976, moved to dismiss the superseding indictment on speedy trial and double jeopardy grounds.

After Defendants' brief on this issue was filed October 26, 1976, the Government filed its Memorandum December 6, 1976. The Court denied Defendants' motion in an Order and Opinion filed March 14, 1977 (A, 73-96). On March 23, 1977, Defendants appealed this Order, and

on September 26, 1977, this Court affirmed in United States v. Sebastian, No. 77-1270, 562 F.2d 211.* On October 14, 1977, the District Court set the case for trial October 25, 1977. On that date, Appellants pled guilty to two substantive counts in the indictment, reserving, with the consent of the Government and the Court, the right to raise the speedy trial issues on appeal (Record, item 43). On December 6, 1977, Defendant Sebastian was sentenced to eighteen months in Federal custody, and Defendant Gibbons was sentenced to two and a half years (Record, item 43). Execution of the sentences was stayed pending this appeal.

POINT I

THE INDICTMENT SHOULD BE DISMISSED UNDER THE WESTERN DISTRICT PLAN BECAUSE THE GOVERNMENT WAS NOT READY FOR TRIAL WITHIN SIX MONTHS.

The Western District Plan requires the Government to be "ready for trial within six months from the date of the arrest...or filing of a complaint." If the

*This Court reviewed only so much of the Order as rejected the double jeopardy argument. The Appeal, insofar as it raised the speedy trial issue, was dismissed with consent of the Appellants May 9, 1977.

Government is not ready within that six-month period, the indictment must be dismissed on motion of the Defendant unless the Government can show that certain periods specified in Rule 5 of the Plan should be excluded from the elapsed time.

In this case, Appellants' six-month period began with the filing of the Complaint against, and arrest of, Appellant Sebastian on May 24, 1973 (A,1,8-9).*

A Notice of Readiness was filed by the Government on November 29, 1973 (A,2,13), which, if valid, would preclude any objection by Appellants under the Plan. (Although the Notice was filed five days after the expiration of six months, more than five days is properly excluded under Rule 5(a) as a time when pre-trial motions were pending.)

We submit, however, that the November 29, 1973, Notice of Readiness must be regarded as a legal nullity, in that the Government was in fact not ready for trial at that time. When the case was finally reached for trial in May, 1976, Government counsel moved for dismissal of the indictment, stating:

Under no theory of the Government's

*We assume that the time from Appellant Gibbons' earlier arrest would be excluded under Rule 5(e) of the Plan, which excludes:

"A reasonable period of delay when the Defendant is joined for trial with a Codefendant as to whom the time for trial has not run, and there is good cause for not granting a severance."

proof could we prove that Defendants violated [§472]...[the indictment] does constitute a violation of §495 of Title 18. However, that is not what is charged in this indictment, and for that reason it is apparent the the indictment is invalid. (A,52).*

Appellants submit that this 1976 confession of unreadiness for trial under the original indictment renders the 1973 Notice of Readiness a nullity. The Government was not ready for trial at any time under the original invalid indictment. The original Notice of Readiness must therefore be disregarded in determining whether the Plan was violated.

The Government filed a Notice of Readiness on July 15, 1976, after the superseding indictment herein, three years, two months and twenty-one days after the original time period began to run. Unlike the November 29, 1973 notice, this notice presumably signifies the Government's actual readiness for trial. The question on this appeal thus narrows to whether the Government has shown** that enough time -- more than two years, eight months and

*It should be noted that Government Counsel at the time of this embarrassed confession, AUSA Roger Williams, is not the Assistant U. S. Attorney who drew the original defective indictment.

**"The burden of proof is on the Government to establish those times to be excluded from the six-months period..." United States v. Flores, 501 F.2d 1356, 1360 n.1 (2d Cir. 1974).

twenty-one days -- is properly excluded from the time which elapsed between the filing of the complaint May 24, 1973, and the July 15, 1976 Notice of Readiness, so as to save the Government from violation of the six months rule.

As this Court has repeatedly held, "not even minimal unexcused delays beyond the six months period are tolerated under the Western District Plan" United States v. Vispi, 545 F.2d 328, 332 (2d Cir. 1976); United States v. McDonough, 504 F.2d 67 (2d Cir. 1974); United States v. Flores, 501 F.2d 1356 (2d Cir. 1974).

We concede that certain periods totalling 546 days between May 24, 1973, and July 15, 1976, are properly excluded.

(1) The period June 28 to December 19, 1973, was a period within which pretrial motions were pending; 174 days may therefore be excluded under Rule 5(a).*

(2) From January 13, to December 4, 1975, was also a period during which pretrial motions were again pending; 325 days may be excluded under Rule 5(a).**

*Were there not sufficient other delay to trigger the six months rule, we would argue that some of this period should be charged to the Government: the period of delay from August 1 to October 4, caused by the Government's erroneous first response to Defendants' motions (compare R, Items 4 and 5 with Items 6 and 6a).

**Again, were it necessary, we would argue that much of this delay is chargeable to the Government: from Defense counsel's letter of September 12, 1975, stating that no further matters would be submitted on a suppression issue,

(3) From the May 7, 1976, dismissal of the indictment until June 24, 1976, no charge was pending against Appellants; 47 days may therefore be excluded. United States v. Flores, supra., 501 F.2d at 1359-60.

Excluding the 546 days conceded above from the period May 24, 1973, to July 15, 1976 (1148 days) leaves 602 days chargeable to the Government, well over the six months allowed the Government under the Western District Plan.

We anticipate that the Government will argue that certain additional periods should be excluded.

The Government argued below, and the Court held, that the period from the December 4, 1975 denial of the suppression motion, until the dismissal of the indictment May 7, 1976 (155 days) should be excluded. We submit that the Court erred: none of the exclusions provided in Rule 5 of the Plan is applicable. As it is clear that the Government was not in fact ready for trial, in the absence of an exclusion this period must be counted against the Government.

Footnote continued:

to October 28, 1975, when the Government responded; perhaps also, the time from October 28, 1975, to December 4, 1975, when the Court finally rendered its opinion denying suppression, should also be excluded as "institutional delay" chargeable to the Government. See United States v. Carini, 562 F.2d 144, 149-50 (2d Cir. 1977).

The Government argued below, and the court held, that the period from the filing of the Government's Notice of Appeal in the first appeal, January 14, 1974,* until this court's order of reversal became final September 16, 1974 with Justice Marshall's refusal to extend the period for filing a certiorari petition, should be excluded. We respectfully disagree with the court below.

The Government's appeal must be seen in its proper context, as a test not of any issues important in Appellants' case, but rather as an attempt to review what the Government saw as a general policy adopted by Judge Curtin. At the suppression hearing, Assistant United States Attorney Srebro referred to the court's supposed "prospective decision that in all future cases Jencks material would have to be turned over (A,25). Mrs. Srebro also sought a brief adjournment "to consult the Department of Justice on this matter because this is a matter that has ...concerned our office." (A,20) Following consultation

*The District Court counted the period December 21, 1973 to January 14, 1974 against the Government. Although we would assert that this period should begin December 19, the Court was clearly correct: no pre-trial motions were then pending, having been decided December 19 in Appellants' favor; and no other exclusion under Rule 5 is available.

with her superiors, including telephonic contact with the Department of Justice in Washington, (A,24-25) Assistant U. S. Attorney Srebro declined to turn over the materials ordered produced by Judge Curtin (A, 24,30). On that appeal, she argued for the Government:

At a prior Suppression Hearing held before the same judge, three weeks earlier on November 20, 1973 in United States v. Annette Nugent, Manuel Perdomo, Stephen E. Levy and Daniel A. Nugent (CR 1973-97; CR. 1973-224), the Court announced its intention to prospectively require the Government turn over those portions of the investigative report of Government witnesses which relate to testimony given by them upon direct examination at pre-trial hearings. (See the Appendix for the Appellant, p. 12.) The case-at-bar represents the first attempt by Judge Curtin to put this policy into effect. As Judge Curtin stated at the hearing: "you realize under the sort of general rule that I intend to enforce in these cases, and that is at the time of hearing that I want any thirty-five hundred material" (Tr. p.21). At the earlier hearing in the Nugent case, the Court seemed not only to condition its prospective ruling upon the Jencks Act but appeared to have intended it also as a disciplinary measure directed at the federal agency involved in that case in order to force that agency to change their reporting methods, which the judge characterized as like "soup". (Appendix for Appellant, pp.6-8.)

Brief of United States in United States v. Sebastian, Docket No. 74-1147 (497 F.2d 1267), pages 5-6. In support of that argument, the Government included in the Appendix in this court, the transcript of the hearing in that prior case.

We submit that it is clear from the above that the only purpose of the Government's refusal to disclose (and the 13 months' delay occasioned by the appeal on that issue) was to vindicate its position on disclosure of Jencks material at pre-trial hearings, and that that motive had little, if anything to do with Appellants' case. This is further confirmed by the Government's turning over of all of the discovery materials at issue in that first appeal; clearly, the Government had no substantial interest in not disclosing the materials at issue in this case. Rather, Appellants' case was merely the occasion for the Government's successful attempt to settle the Jencks Act dispute.

Under the circumstances, the delay caused by the Government's unnecessary appeal should be charged to the Government and not excluded.

The District Court rejected this argument, in the absence of a showing of "bad faith" on the part of the Government, stating that the prosecutor's change of mind did not amount to "bad faith." (A,90). We submit that it is enough that the Government sought to vindicate its interests at the expense of almost 13 months' additional delay to Appellants, where -- as clearly shown by the Government's turning over of the material originally withheld -- there was no necessary connection between the

Government's position and its interest in this case. Where the Goernment chose this case to pursue its interests without regard to the interests of Appellants, it should not be heard to complain if that period is counted against it.*

Although there are a few short periods of adjournment requested or consented to by defense counsel, where that consent or request is "in writing or stated upon the record," Rule 5(a), which may be properly excluded, these amounts of excludable time do not reduce the more than three years of delay to less than six months. The conviction on the superseding indictment should, therefore, be reversed and the indictment dismissed.

*Nor is it sufficient for the Government to argue, as the District Court held, that
the right of the Government to appeal decisions in the defendant's favor is...designed to protect the interests of society in lawfully prosecuting criminal offenders. United States v. Bishton, 463 F.2d 887, 890 (D.C. Cir. 1972) (A,91).

The point here is that the Government, by choosing this relatively minor prosecution to test its view of the Jencks Act, chose to force the adverse suppression decision in this case, precisely so that it could test the issue in this court. The policies cited by the District Court from Bishton, supra, should not be held to apply to this situation.

POINT II

THE INDICTMENT SHOULD BE DISMISSED BECAUSE
THE DEFENDANTS' RIGHTS TO A SPEEDY TRIAL
UNDER THE SIXTH AMENDMENT WERE VIOLATED

The factors to be considered in determining whether the defendants have been denied the Sixth Amendment rights to a speedy trial are clearly delineated in Barker v. Wingo, 407 U.S. 514, 521 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) whether and when the defendants have asserted their rights to a speedy trial; and (4) the prejudice resulting from the delay. See also United States v. Vispi, 545 F.2d 328 (2d Cir. 1976); United States v. Carini, 562 F.2d 144 (2d Cir. 1977).

As this court summarized in Carini:

"These four factors are the primary components of a 'balancing test [which] necessarily compels courts to approach speedy trial cases on an ad hoc basis'... No one 'of the four factors [is, however,] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial'...Rather, and perhaps most critical for purposes of the case presently before us, the four factors "must be considered together with such other circumstances as may be relevant." Barker v. Wingo, supra, 407 U.S. at 533, 92 S.Ct. at 2193 (emphasis supplied); accord, United States v. Vispi, supra at 333." 562 F.2d at 148.

In this case, we suggest that a balancing of the factors listed above compels the conclusion that defendants' Sixth Amendment rights to a speedy trial have been violated.

Length of the delay. Here, the delay between arrest (May 24, 1973 for Sebastian; earlier for Gibbons) and the date finally set for trial (October 25, 1976), over 39 months, is extraordinary. Cf. United States v. Corini:

The length of the delay here -- 34 months -- is, indeed, disturbing and, although, as emphasized in Barker v. Wingo...and demonstrated in our own cases, see United States v. Vispi, supra; United States v. Roberts, supra, length alone is not dispositive, the length of the delay here does unquestionably "trigger"... our review of the three other factors enumerated in Barker. 562 F.2d at 148-49.

Reasons for the delay. Here, as in Carini, supra, "the great bulk of the ... delay must be assessed against the Government." 562 F.2d at 149. A few brief adjournments may be assessed against the defendants and the period consumed by the appeal on double jeopardy ground (March 23, 1977 to September 26, 1977) may also be charged to the defendants. But that leaves more than thirty months' delay, the greater part of which consisted of (1) the "institutional delays" of "an overloaded docket, Judge Elfvin's disqualifications and the vacancy on the

District Court bench created by Judge Henderson's death" that this court has previously noted during this period in the Western District, see United States v. Carini, 562 F.2d at 149-50; (2) delays caused by the Government's error in drafting an invalid original indictment, and (3) the delays caused by the Government's original and unnecessary appeal, as discussed supra pp. 13-16. All of this delay is chargeable to the Government.

And, like the delay in Carini, "no part of the delay here is attributable to the complexity of the charges." 562 F.2d 150. Like the Government's case in Carini, the case against Appellants here was "simple and uncomplicated": the Government had a signed inculpatory statement from Sebastian, and had evidence seized from Gibbons which had been taken in the same Ohio burglary as the bonds passed in this case. Further, the two persons who actually passed the bonds in this case were scheduled as Government witnesses against Sebastian and Gibbons. In short, no delay is attributable to a time-consuming investigation into the circumstances of a complex crime. Cf. United States v. Marion, 404 U.S. 307 (1972).

The Defendants' assertion of their rights.

Here, the Defendants demanded their rights to a speedy trial by moving to dismiss on speedy trial grounds on September 20, 1976, 13 months before the case was finally

reached for trial October 25, 1977. Although it must be conceded that Defendants made no earlier demand for immediate trial such as was made in Carini, supra, or Vispi, supra, it is settled that the mere failure to demand an immediate trial does not constitute a waiver of the right, but is merely one factor to be considered by the Court. See Barker v. Wingo, 407 U.S. 514, 528-30, 533; United States v. Roberts, 515 F.2d 642 (2d Cir. 1975). We urge that the failure of the Appellants to assert their right to a speedy trial until relatively late is overbalanced by the other factors in this case.

Prejudice to Appellants. Because Appellants pled guilty to the charges on the date finally set for trial, we cannot assert one kind of prejudice, to the defense's trial strategy, that was asserted in Carini and Vispi, supra. However, it is clear that prejudice to the fairness of a defendant's trial is not the only sort of prejudice cognizable under the Sixth Amendment, in that values in addition to preserving the fairness of the trial are served by the speedy trial clause. That clause also protects a defendant against the undue prolongation of the usual effect of an indictment, which

may subject him to public scorn and deprive him of employment...indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation." Klopfer v. North Carolina, 386 U.S. 213, 222 (1967), quoting United States v. Ewell, 383 U.S. 116, 120 (1966).

See also Barker v. Wingo, 407 U.S. at 532-33; Strunk v. United States, 412 U.S. 434 (1973) (Injury to rehabilitation of defendant incarcerated on another charge while awaiting trial).*

In addition to the usual anxieties and concerns of being under prosecution, there is an added striking element of prejudice here: because of the Government's error in drafting the invalid original indictment, Appellants were originally brought up to trial once, on May 4 and May 7, 1976, where the Government moved to dismiss the indictment after jury selection at the moment when opening statements were scheduled to be made. In short, the Appellants had to face twice instead of once the terrible ordeal of coming up to trial, solely because of the Government's error.**

*Appellant Gibbons was incarcerated in Ohio on charges stemming from the burglary in which the Savings Bonds in this case were stolen (Record, Item A, Pages 5-19; Item 43, Pages 22-23).

**That it was the Government's negligence distinguishes the case from where a trial error, by the Court, or an error of the Government at trial, requires, at a defendant's request, that a mistrial be declared. Here, Appellants did not have the choice to go ahead under the original indictment, and were compelled to undergo the process of prosecution again from the beginning. Unlike the more common situation, the Appellants here had no part whatever in causing the aborting of the original trial, which must be blamed solely on the Government.

Additional circumstances. In United States v. Carini, 562 F.2d 144 (2d Cir. 1977), this court noted that the four factors specifically enumerated in Barker v. Wingo were not the only circumstances to be considered in assessing a defense claim of violation of Sixth Amendment rights, and that

The four factors "must be considered together with such other circumstances as may be relevant". 562 F.2d 148, quoting Barker v. Wingo, 407 U.S. at 533.

In Carini, the court held that violation of the Speedy Trial Act (although a violation which, because of the lack of applicable sanctions in the Act at that time, did not of its own force require dismissal) was such a relevant circumstance, and was sufficient to "tip the scales" in Carini's favor. 562 F.2d 151-52.

An analogous factor is present here: the violation of the Plan, discussed above in Point I. Appellants submit that this violation, too, should tip the scales in their favor and compel a holding that Appellants' Sixth Amendment rights were violated.

This court should so hold, even if it holds that a technical violation of the Plan did not occur. Even if the greater part of the delay caused by the first appeal here is excluded, on the ground that Rule 5(a) literally excludes the time consumed by "interlocutory appeals" of whatever nature, it remains clear that that

appeal was taken not to protect any interests of the Government in this case but to vindicate its position for other cases, and that the appeal was taken in disregard of the additional delays it would impose on Appellants' case. This sort of purposeful delay by the Government should be an additional factor sufficient to compel the dismissal, whether or not the Plan was technically violated.

Under all the circumstances, then, we ask the court to hold that Appellants' Sixth Amendment right to a speedy trial was violated in this case.

CONCLUSION

For the above reasons, Appellants respectfully request that their convictions be reversed, and that the matter be remanded for dismissal of the superseding indictment herein.

Respectfully submitted

Dated: Buffalo, New York
February 24, 1978

ROBERT C. MACEK, ESQ.
GROSS, SHUMAN, LAUB & DAVID
Attorneys for Appellant Sebastian
Office and Post Office Address
2600 Main Place, Buffalo, N. Y. 14202
(716) 854-4300

GEORGE P. DOYLE, ESQ.
DOYLE, DENMAN, AND D'AMICO
Attorneys of Appellant Gibbons
Office and Post Office Address
10 Ellicott Square Building
Buffalo, N. Y. 14202
(716) 856-3486

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee)
City of Batavia)

USA vs. Anthony James Sebastian &
Patricia Gibbons

77-1504

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Leslie R. Johnson

Sworn to before me this
27th day of February, 19 78

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979

